Supreme Court, U.S.
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NO. 97-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

KENNETH H. SCHRAGER,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State of Illinois

PETITION FOR WRIT OF CERTIORARI

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60pp

QUESTION PRESENTED

DID THE UNITED STATES SUPREME COURT, BY ITS DECISION IN *UNITED STATES V. URSERY*, 518 U.S. _____ , 116 S.CT. 2135, 135 L.ED.2D 549 (1996), RULE THAT ALL CIVIL FORFEITURES DO NOT REPRESENT PUNISHMENT, AND THUS, DO NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE?

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Third District, was not reported, and is reprinted in the Appendix at 1. The petition for rehearing in the Appellate Court was denied. The denial of the petition for rehearing is reprinted in the Appendix at 4. The petition for leave to appeal to the Illinois Supreme Court was denied and is reprinted in the Appendix at 5. The opinion of the trial court (or circuit court) is unreported and is reprinted in the Appendix at 6.

JURISDICTION

The petition for leave to appeal to the Illinois Supreme Court was denied on April 2, 1997. This petition for certiorari was timely filed within ninety (90) days of that date. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THIS QUESTION CONCERNS WHETHER OR NOT A CIVIL FORFEITURE UNDER THE ILLINOIS DRUG ASSET FORFEITURE PROCEDURE ACT, 725 ILCS 150/1, ET SEQ., CAN IN CERTAIN INSTANCES CONSTITUTE PUNISHMENT FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE ILLINOIS DRUG ASSET FORFEITURE PROCEDURE ACT IS SET FORTH IN THE APPENDIX AT 8. THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS SET OUT IN THE APPENDIX AT 19.

STATEMENT OF THE CASE

On August 8, 1994, a police officer initiated a routine traffic stop on the vehicle in which the petitioner was a passenger. The police officer asked the petitioner to exit the vehicle and observed what he believed to be cocaine on the passenger's shirt and in a package of Lifesavers between the driver's and passenger's seat. This substance turned out not to be cocaine, but on that basis the police officer asked to search the hotel room of the driver in whose room the petitioner was staying. (The traffic stop occurred in the hotel parking lot.)

A search of the room revealed cannabis in several different places and United States currency found in four different places--inside a briefcase, inside a pocket of men's pants, inside a monthly planner, and inside the shirt of the petitioner. The suspected cocaine originally found in the vehicle turned out not to be cocaine, however, when the petitioner was processed at the jail, he dropped a bag containing a small amount of white powdery substance which turned out to be .4 grams of cocaine.

On August 23, 1994, petitioner was charged in a 2-count indictment with unlawful possession of cannabis and cocaine.

In a separate independent proceeding with a different case number and before a different judge, the State of Illinois sought to forfeit the $3,456 found in various places by the police officer on the night of petitioner's arrest. The complaint for forfeiture was brought pursuant to the Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/1 et seq. (See Appendix at 8)

The petitioner filed a verified answer denying the allegations of the forfeiture complaint and further filed seven affirmative defenses, including what is otherwise known as the "innocent owner's defense" under the Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/8(A)(i). (See Appendix at 14)

As further defenses the petitioner also stated the money was not subject to forfeiture because the money was never used or intended to be used to facilitate a felony violation and was not found in close proximity to drug paraphernalia, nor was it the proceeds from a felony violation. After hearing on the forfeiture complaint, the judge granted judgment in favor of the State and against petitioner in the amount of $3,456, and the money was forfeited and distributed pursuant to statute.

Thereafter the petitioner filed a motion to dismiss in his felony case, alleging that his pending indictment represented double jeopardy since he had already been punished for his alleged behavior as a result of the previous judgment taken by the State in the forfeiture case. (See Appendix at 20) The trial judge denied the motion to dismiss on January 25, 1996. (See Appendix at 6)

The petitioner then filed a direct appeal of the denial of his motion to dismiss. While the petitioner's case was pending in the Third District Appellate Court of Illinois, the United States Supreme Court came out with its ruling in *Ursery*. The appellate court then ruled on October 22, 1996, that in light of the United States Supreme Court's ruling in *Ursery*, that civil forfeitures are not subject to double jeopardy analysis, and thus, it affirmed the trial court's denial of the petitioner's motion to dismiss on grounds of double jeopardy. (See Appendix at 1)

The petitioner then timely filed a petition for leave to appeal to the Illinois Supreme Court. While this petition was pending, the Illinois Supreme Court reversed its previous ruling in *Illinois v. Kimery*, (Ill. S.Ct., 169 Ill.2d 260, 661 N.E.2d 329, 58 CRL 1357 (1996), which had held that civil in rem forfeitures constitute punishment for purposes of the Double Jeopardy Clause. The reason for this reversal was due to a summary disposition from this court to vacate their judgment and reconsider it in light of *Ursery*. (*Illinois v. Kimery*, U.S. S.Ct. No. 95-1436) That reconsideration was handed down on January 30, 1997. (See *Illinois v. Kimery*, 175 Ill.2d 79, 676 N.E.2d 656. Appendix at 24.)

The petitioner's leave to the Illinois Supreme Court was then denied on April 2, 1997. (See Appendix at 5.)

ARGUMENT

The decision of the Illinois Supreme Court relying on this court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) that its Illinois Drug Asset Forfeiture Act can never constitute punishment for double jeopardy purposes is an improper interpretation of this court's decision in *Ursery*.

Ursery was a bombshell dropped on defendants and courts around the country who thought that a realistic interpretation of the various cases in connection with civil forfeitures and double jeopardy led in many instances to a finding of a double jeopardy violation. Prior to *Ursery*, these same defendants and courts relied on three key recent Supreme Court cases, those being: *Austin v. United States*, 509 U.S. 602, 125 L.Ed.2d 488 (1993), *United States v. Halper*, 490 U.S. 437, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The Illinois Supreme Court gave too much weight to this court's ruling in *Ursery*, as did many jurisdictions around the country. On April 14, 1997, this court granted certiorari in *Hudson v. United States*, 96-976, to clarify the *Ursery* decision and to further clarify when the assessment of civil fines and criminal penalties based on the same conduct violated the constitution's double jeopardy prohibition. The *Hudson* case involved federal civil actions and fines. Like it has agreed to do in *Hudson v. United States*, this court should clarify for the Illinois Supreme Court and other courts around this country just how far it intended to go in its ruling in the *Ursery* case.

This court in *Ursery* chastised the Court of Appeals for the

Sixth and Ninth Districts stating those courts misread *Halper, Austin,* and *Kurth Ranch*, and appeared to abandon the long-standing decisions in *One Lot Emerald Cut Stones*, (1972) 409 U.S. 232 and *U.S. v. 89 Firearms*, (1984) 465 U.S. 354. This court, however, could have also chastised many other jurisdictions because prior to *Ursery*, many courts of this country believed that *Austin, Halper,* and *Kurth Ranch*, when read together, stood for the proposition that an in rem forfeiture could constitute punishment under certain circumstances thereby implicating the double jeopardy clause. A partial list of state and federal courts of review so indicating this proposition prior to *Ursery* were as follows:

United States v. Stoller, 78 F.3d 710 (1st Cir. 1996);
United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 490 (2d Cir. 1995)(noting "some forfeitures can be punitive");
United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160 (3d Cir. 1995)(acknowledging that forfeitures could constitute double jeopardy if they are punitive);
United States v. Cullen, 979 F.2d 992 (4th Cir. 1992);
United States v. Perez, 70 F.3d 345, 348 (5th Cir. 1995)("the governing legal standard for resolving [when a civil penalty may constitute punishment for double jeopardy purposes] is whether the civil sanction serves solely a remedial purpose");
Smith v. United States, 76 F.3d 879 (7th Cir. 1996);
United States v. Clementi, 70 F.3d 997 (8th Cir. 1995);
United States v. Cordoba, 71 F.3d 1543 (10th Cir. 1995)(double jeopardy applies to in rem forfeiture proceedings when the forfeiture constitutes punishment);
United States v. El-Difrawi 898 F.Supp.3 (D.C.Cir. 1995)(*Austin* extended the *Halper* standard to in rem forfeitures);
State v. Leyva, 184 Ariz. App. 439, 909 P.2d 506 (1995);
People v. $1,930 U.S. Currency, 38 Cal. App. 4th 834, 45 Cal. Rptr. 2d 322 (1995);
Waye v. State, 219 Ga. App. 22, 464 S.E.2d 19 (1995)(in rem forfeiture may constitute punishment for double jeopardy purposes when imposed for retribution and deterrence);
In re P.S., 169 Ill. 2d 260, 661 N.E.2d 329 (1996);

State v. McFarlin, 542 N.W.2d 559, 562 (Iowa 1996)(stating, "we must classify a civil forfeiture *** of a controlled substance and the accompanying proceeds from illegal sales as punishment [in some circumstances]");
State v. 1979 Cadillac DeVille, 632 So. 2d 1221 (La.Ct.App. 1994);
People v. Hellis, 211 Mich. App. 634, 536 N.W.2d 587 (1995);
State v. Rosenfeld, 540 N.W.2d 915 (Minn. App. 1995);
State v. Williams, 286 N.J.Super.507, 669 A.2d 867 (1995);
District Attorney v. Iadarola, 164 Misc. 2d 204, 623 N.Y.S.2d 999 (N.Y.Sup.Ct. 1995);
State v. 1989 Ford F-150 Pickup, 888 P.2d 1036 (Okla. Ct. App. 1994);
Commonwealth v. Wingait Farms, 659 A.2d 584 (Pa. Commw. 1995);
State v. One Lot of $8,560 U.S. Currency, 670 A.2d 772 (R.I. 1996);
Fant v. State, 881 S.W.2d 830, 834 (Tex.Ct.App. 1994)("[I]n light of the *** Supreme Court decisions [in *Halper* and *Austin*], we must conclude that appellant has already been punished for his criminal conduct by the forfeiture of his property [$3,823 and a cellular phone], and the Double Jeopardy Clause *** prohibits further punishment by the State for the same incident");
State v. Cole, 128 Wash.2d 262, 906 P.2d 925 (1995);
State v. Riley, 166 Wis.2d 299, 479 N.W.2d 234 (1991).

This petitioner's case was pending at the time of the *Ursery* ruling last year. At that same time there was also pending in this court a petition for writ of certiorari in the case of *Illinois v. Kimery* (95-1436), 169 Ill.2d 260, 661 N.E.2d 329, 58 Cr.L. 1397 (1996). Had that case not been vacated and remanded to the Supreme Court of Illinois for further consideration in light of *Ursery*, the Supreme Court of Illinois would most likely have ruled in favor of this petitioner as *Kimery* had previously ruled that civil in rem forfeitures pursuant to Illinois drug forfeiture statutes can constitute punishment for purposes of the double jeopardy clause.

Unlike the Sixth and Ninth District Federal Appellate Courts which were chastised by this court in *Ursery*, the Illinois Supreme Court in its original *Kimery* ruling had done a very careful analysis of all the Supreme Court cases including *Halper*, *Kurth Ranch*, and *Austin*. It went through a very carefully reasoned analysis of these three cases. With respect to *Halper*, the court said, "In Halper the court considered whether and under what circumstances a civil penalty may constitute punishment for double jeopardy purposes. The Illinois Supreme Court further recognized that *Halper* did not preclude the state from seeking the full range of civil penalties against the defendant who has previously not been punished for the same conduct, nor did it preclude the imposition of the full range of civil and criminal penalties in the same proceeding. The Illinois Supreme Court in its original *Kimery* decision then went into a discussion of *Austin*. They correctly stated that the issue in *Austin* was whether the excessive fines clause of the eighth amendment applied to forfeitures for property under the Federal Controlled Substances Forfeiture Act. The Illinois Supreme Court did not misinterpret *Austin* to apply to double jeopardy cases. Instead, it used *Austin*'s reasoning to help it determine whether the actions of the state in the case before it represented punishment, and thus, violated double jeopardy rules.

The Illinois Supreme Court in that same *Kimery* decision also carefully considered the cases of *One Lot Emerald Cut Stones*, (1972) 409 U.S. 232 and *U.S. v. 89 Firearms*, (1984) 465 U.S. 354, key cases which were cited by this court in *Ursery*. This court in citing those cases stated:

> "The United States Supreme Court has long recognized that double jeopardy does not preclude the imposition of both a criminal and civil sanction with respect to the same act or omission provided that the civil sanction does not constitute punishment for double jeopardy purposes."

The Illinois Supreme Court in its reasoning and analysis

of *Halper, Austin* and *Kurth Ranch*, as well as the recognition that none of those decisions overruled the United States Supreme Court's previous decision in *One Lot Emerald Cut Stones* and *U.S. v. 89 Firearms* is vitally important because this court in *Ursery* chastised the Court of Appeals for the Sixth and Ninth Districts because those courts misread *Halper, Austin* and *Kurth Ranch* and appeared to abandon the long-standing decisions in *One Lot Emerald Cut Stones* and *U.S. v. 89 Firearms*. Unlike the Sixth and Ninth District Courts of Appeals, the Illinois Supreme Court quite capably reviewed *Halper, Austin* and *Kurth Ranch*. It understand that *One Lot Emerald Cut Stones* and *U.S. v. 89 Firearms* had not yet been overruled. Yet within that framework of understanding, the Illinois Supreme Court came to the conclusion that in certain instances, the actions of the State, whether labeled as civil or criminal, could in fact violate the double jeopardy rule if, and only if, the actions of the State, no matter how they were labeled, constituted separate punishments for the same offense.

Ursery does not stand for the proposition that all civil forfeitures are in rem proceedings or that civil forfeitures never violate the double jeopardy laws. Granted, *Ursery* severely limits the number of occasions in which a forfeiture proceeding can constitute a double jeopardy violation, however, petitioner's case is one of those situations which should indeed be considered a double jeopardy violation. Had the Illinois Supreme Court closely read the *Ursery* decision, it would not have made a blanket denial and stated that no forfeiture proceedings can constitute punishment, and thus, a double jeopardy violation.

The money forfeited in petitioner's case had nothing to do with the crimes charged. There was absolutely no evidence presented that the money forfeited in petitioner's case was either drug proceeds or was being used in illegal drug activity. There were small amounts of drugs and they were not packaged for sale.

This court in *Ursery* stated that the relevant question in *Austin* was not whether a particular proceeding was criminal or

civil, but rather, was whether forfeiture under the Federal Drug Forfeiture Act constituted punishment for purposes of the eighth amendment. This court concluded that the forfeiture in the *Austin* case did constitute payment to a sovereign as punishment for some offense, and as such, is subject to the limitations of the eighth amendment's excessive fines clause. This court also goes on to say in *Austin* that forfeitures serve a variety of purposes but are designed primarily to confiscate property used in violation of the law and to require disgorgement of the fruits of illegal conduct.

Taking into consideration the above rulings by this court, the facts of petitioner's case become relevant because the forfeiture in this case was not of property used in violation of the law and was not the fruit of any illegal conduct. The money confiscated in this case bore no relationship to petitioner's crimes of possession of cocaine or cannabis. It was not remedial in any way. It was not liquidated damages for the government's harm that resulted from the petitioner's actions.

Since the money confiscated in this case was neither drug proceeds nor being used in the illegal drug activity charged by the State, it does not make sense to characterize this forfeiture as an action against the property. In *Ursery* this court resorted to the analysis defining some in rem forfeitures as being actions against the property. Through resort to illegal fiction they conclude that it is the property which is held guilty and condemned. The money confiscated in petitioner's case was unlike the cases involving drug sales by defendants wherein the money was the proceeds of illegal activity, and was also unlike the cases where houses were forfeited because they were used to grow drugs, and also unlike cases where vehicles were forfeited because they were used to transport the drug salesman/defendant and the contraband.

The money confiscated in this case was innocent. The charging instrument in the separate forfeiture case brought by the State charged the petitioner with possession of cannabis and possession of cocaine. The money was forfeited because the court

found that the petitioner possessed cannabis and cocaine.

The money forfeited in petitioner's case has to be considered punishment. Thus, in this case, it is one of the certain limited instances when later criminal actions charging the same offense, such as possession, violate the double jeopardy clause. This is true regardless of whether the first proceeding is labeled a civil forfeiture or something else. It makes no difference. The court needs to look at the underlying actions. The criminal offense of possession can, therefore, be subsumed by the forfeiture statute and the allegations of the forfeiture complaint, thus making the later criminal prosecution a double jeopardy violation.

The Illinois Supreme Court in its reconsideration of *Kimery* went too far. *Ursery* certainly left room for fact situations such as petitioner's to be considered double jeopardy violations. The bottom line is that the facts of petitioner's case compel a conclusion that the taking of the money from the petitioner was nothing more than punishment of the petitioner. The subsequent prosecution should have been dismissed because of a double jeopardy violation.

CONCLUSION

The decision of the Illinois Supreme Court is in direct conflict with this court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

For the foregoing reasons, the petitioner respectfully requests this court grant his petition for a writ of certiorari, and, in the alternative, grant his petition for writ of certiorari, vacate the Illinois Supreme Court judgment, and remand for further consideration.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Court of Illinois, Third District	App. 1
Denial of Petition for Rehearing	App. 4
Denial of Petition for Leave to Appeal	App. 5
Opinion of the Trial Court	App. 6
Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/1, et seq.	App. 8
Fifth Amendment, U. S. Constitution	App. 19
Motion to Dismiss on Grounds of Former Jeopardy	App. 20
Illinois v. Kimery, 175 Ill.2d 79, 676 N.E.2d 656	App. 24

No. 3-96-0162

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 1996

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 10th Judicial Circuit) Peoria County, Illinois
Plaintiff-Appellee,	)
v.	) No. 94-CF-719
KENNETH H. SCHRAGER,	) Honorable) Robert E. Manning
Defendant-Appellant.	) Judge, Presiding.

SUMMARY ORDER "Not To Be Published"

Defendant, Kenneth H. Schrager, was charged with unlawful possession of cannabis and cocaine after the car in which he was a passenger was stopped for minor traffic violations on August 8, 1994. A subsequent search of the hotel room in which defendant had been staying revealed two partially burnt cannabis cigarettes, a large plastic bag containing 33.2 grams of cannabis in a nightstand, two plastic bags with 187.6 grams of cannabis, a pager and $3,100 in United States currency in a black briefcase, $38 in the pocket of a pair of men's pants, $120 in a monthly planner and $198 in defendant's shirt. In addition, defendant dropped a bag containing .4 grams of cocaine while he was being

processed at the jail.

The State sought civil forfeiture of the $3,456 in cash, and the trial court granted the petition. Defendant filed a motion to dismiss the criminal prosecution on the ground that it would subject him to double jeopardy. The trial court took the motion under advisement pending the issuance of the Illinois Supreme Court's decision in In re P.S., 169 Ill. 2d 661 N.E.2d 329 (1996), vacated and remanded sub nom. Illinois v. Kimery, ___ U.S. ___, 135 L. Ed. 2d 1092, 116 S. Ct. 2577 (1996), and subsequently denied the motion. Defendant appeals the denial. We affirm.

Defendant contends that double jeopardy analysis applies here, and he attempts to distinguish the United States Supreme Court's recent opinion in United States v. Ursery, 518 U.S. ___, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996).

In Ursery, the Court reaffirmed its unanimous holding in Various items of Personal Property v. United States, 282 U.S. 577, 75 L. Ed. 2d 558, 51 S. Ct. 282 (1931), which stated that in rem civil forfeitures are not subject to double jeopardy analysis. The Court explained that:

> " '[This] forfeiture proceeding . . . is in rem. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.' " Ursery, 518 U.S. at ___, 135 L. Ed. 2d at 559, 116 S. Ct. at ___, quoting Various items, 282 U.S. at 581, 75 L. Ed. 2d at 561, 51 S. Ct. at 284 (citations omitted; emphasis added).

Based on this analysis, the Court vacated the decision in P.S. and

remanded it for further review.

In People v. Felix, ___ Ill. App. 3d ___, ___, 668 N.E.2d 644, 646 (1996), the court reviewed Ursery and relied on it in affirming the denial of the defendants' motions to dismiss on the basis of double jeopardy. We concur in this reasoning. The criminal prosecution of defendant after the civil forfeiture in the instant case did not violate the double jeopardy clause.

For the reasons stated, the judgment of the circuit court of Peoria County is affirmed in accordance with Supreme Court Rule 23(c)(2) (Official Reports Advance Sheet No. 15 (July 20, 1994), R. 23(c)(2), effective July 1, 1994).

Affirmed.

LYTTON, J., with HOLDRIDGE, P.J., and McCUSKEY, J., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 22nd day of October in the year of our Lord one thousand nine hundred and ninety-six.

/s/ Gist Fleshman
Clerk of the Appellate Court

STATE OF ILLINOIS

THIRD DISTRICT APPELLATE COURT

GIST FLESHMAN
Clerk of the Court
815 434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815 434-5068

Be it remembered, That, to wit: On the 5th day of December, 1996, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-96-0162

People of the State of Illinois, Appellee, v. Kenneth H. Schrager, Appellant.	APPEAL FROM: Peoria County Hon. Robert E. Manning 94 CF 719

Now on this day this cause coming on for hearing upon the petition for rehearing filed by the Appellant, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ Gist Fleshman
Clerk of the Court

ILLINOIS SUPREME COURT
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April 2, 1997

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No. 82568 - People State of Illinois, respondent, v. Kenneth Schrager, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 1997.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

THE PEOPLE OF THE	)	
	)	
STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 94-CF-719
	)	
KENNETH H. SCHRAGER,	)	
	)	
Defendant.	)	

ORDER

A hearing has previously been held on defendant's Motion to Dismiss on grounds of double jeopardy. That Motion was taken under advisement by the Court until the receipt of the decision of the Illinois Supreme Court in People v. Kimery, et al.

On January 18, 1996, the Illinois Supreme Court filed its opinion in the matter of the People v. Kimery, et al., and the Court will now rule on this defendant's Motion.

The sole question presented in the Motion before the Court in this case was decided adversely to defendant's contentions.

It is, therefore, ordered that the Motion to Dismiss on the grounds of double jeopardy is denied.

This matter is hereby set for trial for Monday, April 29, at 9:15 a.m. The Clerk shall copy this Order to the defendant, his attorney and the State's Attorney at their addresses as disclosed by the pleadings herein.

Entered this 25th Day of January 1996.

/s/ Robert E. Manning
Robert E. Manning, Circuit Judge

ACT 150. DRUG ASSET FORFEITURE PROCEDURE ACT

Section

150/1. Short title.
150/2. Legislative declaration.
150/3. Applicability/
150/4. Notice to owner or interest holder.
150/5. Notice to state's attorney.
150/6. Non-judicial forfeiture.
150/7. Presumptions.
150/8. Exemptions from forfeiture.
150/9. Judicial in rem procedures.
150/10. Stay of time periods.
150/11. Settlement of claims.
150/12. Status of property constituting attorney's fees.
150/13. Construction.
150/14. Judicial review.

150/1. Short title

§ 1. Short Title. This Act shall be known and may be cited as the Drug Asset Forfeiture Procedure Act.

P.A. 86-1382, § 1, eff. Sept. 10, 1990.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1671.

Title of Act:

An Act in relation to the establishment of uniform procedures for the seizure and forfeiture of drug related assets, and amending named Acts. P.A. 86-1382, approved and eff. Sept. 10, 1990.

150/2. Legislative declaration.

§ 2. Legislative Declaration. The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to or facilitates the manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act ① or

the Cannabis Control Act,② will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. While forfeiture may secure for State and local units of government some resources for deterring drug abuse and drug trafficking, forfeiture is not intended to be an alternative means of funding the administration of criminal justice. The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom.

P.A. 86-1382, § 2, eff. Sept. 10, 1990. Amended by P.A. 87-614, § 5, eff. Sept. 18, 1991.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1672.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

150/3. Applicability

§ 3. Applicability. The provisions of this Act are applicable to all property forfeitable under the Illinois Controlled Substances Act ① or the Cannabis Control Act.②

P.A. 86-1382, § 3, eff. Sept. 10, 1990.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1673.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

150/4. Notice to owner or interest holder

§ 4. Notice to Owner or Interest Holder. (A) Whenever notice of pending forfeiture or service of an in rem complaint is required under the provisions of this Act, such notice or service shall be given as follows:

(1) If the owner's or interest holder's name and current

address are known, then by either personal service or mailing a copy of the notice by certified mail, return receipt requested, to that address. For purposes of notice under this Section, if a person has been arrested for the conduct giving rise to the forfeiture, then the address provided to the arresting agency at the time of arrest shall be deemed to be that person's known address. Provided, however, if an owner or interest holder's address changes prior to the effective date of the notice of pending forfeiture, the owner or interest holder shall promptly notify the seizing agency of the change in address or, if the owner or interest holder's address changes subsequent to the effective date of the notice of pending forfeiture, the owner or interest holder shall promptly notify the State's Attorney of the change in address; or

(2) If the property seized is conveyance, to the address reflected in the office of the agency or official in which title or interest to the conveyance is required by law to be recorded, then by mailing a coy of the notice by certified mail, return receipt requested, to that address; or

(3) If the owner's or interest holder's address is not known, and is not on record as provided in paragraph (2), then by publication for 3 successive weeks in a newspaper of general circulation in the county in which the seizure occurred.

(B) Notice served under this Act is effective upon personal service, the last date of publication, or the mailing of written notice, whichever is earlier.

P.A. 86-1382, § 4, eff. Sept. 10, 1990. Amended by P.A. 87-614, § 5, eff. Sept. 18, 1991.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1674.

150/5. Notice to state's attorney

§ 5. Notice to State's Attorney. The law enforcement

agency seizing property for forfeiture under the Illinois Controlled Substances Act ① or the Cannabis Control Act ② shall, within 52 days of seizure, notify the State's Attorney for the county in which an act or omission giving rise to the forfeiture occurred or in which the property was seized of the seizure of the property and the facts and circumstances giving rise to the seizure and shall provide the State's Attorney with the inventory of the property and its estimated value. When the property seized for forfeiture is vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle.

P.A. 86-1382, § 5, eff. Sept. 10, 1990.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1675.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

150/6. Non-judicial forfeiture

§ 6. Non-Judicial Forfeiture. If non-real property that exceeds $20,000 in value excluding the value of any conveyance, or if real property is seized under the provisions of the Illinois Controlled Substances Act ① or the Cannabis Control Act ②, the State's Attorney shall institute judicial in rem forfeiture proceedings as described in Section 9 of this Act within 45 days from receipt of notice of seizure from the seizing agency under Section 5 of this Act. However, if non-real property that does not exceed $20,000 in value excluding the value of any conveyance is seized, the following procedure shall be used:

(A) If, after review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure from the seizing agency, the State's Attorney shall cause notice of pending forfeiture to be given to the owner of the property in accordance with Section 4 of this Act.

(B) The notice of pending forfeiture must include a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or

the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(C)(1) Any person claiming an interest in property which is the subject of notice under subsection (A) of Section 6 of this Act, may, within 45 days after the effective date of notice as described in Section 4 of this Act, file a verified claim with the State's Attorney expressing his or her interest in the property. The claim must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provision of law relied on in asserting the property is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the relief sought.

(2) If a claimant files the claim and deposits with the State's Attorney a cost bond, in the form of a cashier's check payable to the clerk of the court in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $100, whichever is greater, upon condition that, in the case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings, then the State's Attorney shall institute judicial in rem forfeiture proceedings and deposit the cost bond with the clerk of the court as described in Section 9 of this Act within 45 days after receipt of the claim and cash bond. In lieu of a cost bond, a person claiming interest in the seized property may file, under penalty of perjury, an indigency affidavit.

(3) If none of the seized property is forfeited in the judicial in rem proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited. If any of the seized property is forfeited under the judicial forfeiture proceeding, the clerk of the court shall transfer 90% of the sum which has been deposited to the State's Attorney prosecuting the civil forfeiture to be applied to the costs of prosecution and the clerk shall retain as costs 10% of the sum deposited.

(D) If no claim is filed or bond given within the 45 day period as described in subsection (C) of Section 6 of this Act, the State's Attorney shall declare the property forfeited and shall promptly notify the owner and all known interest holders of the property and the Director of the Illinois Department of State Police of the declaration of forfeiture and the Director shall dispose of the property in accordance with law.

P.A. 86-1382, § 6, eff. Sept. 10, 1990. Amended by P.A. 87-614, § 5, eff. Sept. 18, 1991.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1676.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

150/7. Presumptions

§ 7. Presumptions. The following situations shall give rise to a presumption that the property described therein was furnished or intended to be furnished in exchange for a substance in violation of the Illinois Controlled Substances Act ① or the Cannabis Control Act, ② or is the proceeds of such an exchange, and therefore forfeitable under this Act, such presumptions being rebuttable by a preponderance of the evidence:

(1) All moneys, coin, or currency found in close proximity to forfeitable substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of substances;

(2) All property acquired or caused to be acquired by a person either between the dates of occurrence of two or more acts

in felony violation of the Illinois Controlled Substances Act or the Cannabis Control Act, or an act committed in another state, territory or country which would be punishable as a felony under either the Illinois Controlled Substances Act or the Cannabis Control Act, committed by that person within 5 years of each other, or all property acquired by such person within a reasonable amount of time after the commission of such acts if:

(a) At least one of the above acts was committed after the effective date of this Act; and

(b) A least one of the acts is or was punishable as a Class X, Class 1, or Class 2 felony; and

(c) There was no likely source for such property other than a violation of the above Acts.

P.A. 86-1382, § 7, eff. Sept. 10, 1990.

Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1677.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

150/8. Exemptions from forfeiture

§ 8. Exemptions from forfeiture. A property interest is exempt from forfeiture under this Section if its owner or interest holder establishes by a preponderance of evidence that the owner or interest holder:

(A)(i) in the case of personal property, is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur, or

(ii) in the case of real property, is not legally accountable for the conduct giving rise to the forfeiture, or did not solicit, conspire, or attempt to commit the conduct giving rise to the forfeiture; and

(B) had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other than as an interest holder in an arms length commercial transaction; and

(C) with respect to conveyances, did not hold the property jointly or in common with a person whose conduct gave rise to the

forfeiture; and

(D) does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in the conduct giving rise to the forfeiture; and

(E) that the owner or interest holder acquired the interest:

(i) before the commencement of the conduct giving rise to its forfeiture and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(ii) after the commencement of the conduct giving rise to its forfeiture, and the owner or interest holder acquired the interest as a mortgagee, secured creditor, lienholder, or bona fide purchaser for value without knowledge of the conduct which gave rise to the forfeiture; and

(a) in the case of personal property, without knowledge of the seizure of the property for forfeiture; or

(b) in the case of real estate, before the filing in the office of the Recorder of Deeds of the county in which the real estate is located of a notice of seizure for forfeiture or a lis pendens notice.
P.A. 86-1382, § 8, eff. Sept. 10, 1990.
Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1678.

150/9. Judicial in rem procedures

§ 9. Judicial in rem procedures. If property seized under the provisions of the Illinois Controlled Substances Act ① or the Cannabis Control Act ② is non-real property that exceeds $20,000 in value excluding the value of any conveyance, or is real property, or a claimant has filed a claim and a cost bond under subsection (C) of Section 6 of this Act, the following judicial in rem procedures shall apply:

(A) If, after a review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure by the seizing agency or the filing of the claim and cost

bond, whichever is later, the State's Attorney shall institute judicial forfeiture proceedings by filing a verified complaint for forfeiture and, if the claimant has filed a claim and cost bond, by depositing the cost bond with the clerk of the court. When authorized by law, a forfeiture must be ordered by a court on an action in rem brought by a State's Attorney under a verified complaint for forfeiture.

(B) During the probable cause portion of the judicial in rem proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information. The laws of evidence relating to civil actions shall apply to all other portions of the judicial in rem proceeding.

(C) Only an owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. For purposes of this Section, the owner or interest holder shall be referred to as claimant.

(D) The answer must be signed by the owner or interest holder under penalty of perjury and must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provisions of Section 8 of this Act relied on in asserting it is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the precise relief sought.

(E) The answer must be filed with the court within 45 days after service of the civil in rem complaint.

(F) The hearing must be held within 60 days after filing of the answer unless continued for good cause.

(G) The state shall show the existence of probable cause for forfeiture of the property. If the State shows probable cause, the

claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(H) If the State does not show existence of probable cause or a claimant has established by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act, the court shall order the interest in the property returned or conveyed to the claimant and shall order all other property forfeited to the State. If the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act, the court shall order all property forfeited to the State.

(I) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding under this Act regardless of the pendency of an appeal from that conviction. However, evidence of the pendency of an appeal is admissible.

(J) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act; however, for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information alleging a violation of the Illinois Controlled Substances Act or the Cannabis Control Act. Such a stay shall not be available pending an appeal. Property subject to forfeiture under the Illinois Controlled Substances Act or the Cannabis Control Act shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney.

(K) All property declared forfeited under this Act vests in this State on the commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing

under the provisions of this Act that the transferee's interest is exempt under Section 8 of this Act.

(L) A civil action under this Act must be commenced within 5 years after the last conduct giving rise to forfeiture became known or should have become known or 5 years after the forfeitable property is discovered, whichever is later, excluding any time during which either the property or claimant is out of the State or in confinement or during which criminal proceedings relating to the same conduct are in progress.

P.A. 86-1382, § 9, eff. Sept. 10, 1990. Amended by P.A. 87-614, § 5, eff. Sept. 18, 1991; P.A. 89-404, § 35, eff. Aug. 20, 1995. Formerly Ill. Rev. Stat. 1991, ch. 56½, ¶ 1679.

① 720 ILCS 570/100 et seq.

② 720 ILCS 550/1 et seq.

Amendment 5. - CRIMINAL PROSECUTIONS; DUE PROCESS OF LAW; EMINENT DOMAIN

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	Case No. 94-CF-719
KENNETH H. SCHRAGER,	)	
Defendant.	)	

MOTION TO DISMISS ON GROUNDS OF FORMER JEOPARDY

Now comes the Defendant, KENNETH H. SCHRAGER, by his attorneys, PARKER & HALLIDAY, and in support of his Motion to Dismiss on Grounds of Former Jeopardy, states as follows:

1. That the basis of this Motion is set forth in 725 ILCS 5/114-1(2), United States Constitution, Amendment 5, and Illinois Constitution 1970, Article I, Section 10.

2. That the actions of the People of the State of Illinois constitute multiple punishments for the same offense as Defendant was previously punished for these offenses in separate proceedings, those being the complaint for forfeiture and orders entered in Peoria County Case Number 94-MR-262.

3. That the pertinent facts necessary to a determination of Defendant's Motion are as follows:

(a) That on August 8, 1994, a deputy of the Peoria County

Sheriff's Department initiated traffic stop on a white Lincoln for improper lane usage and failure to signal.

(b) That the Defendant, KENNETH H. SCHRAGER, was arrested and a search of the Defendant and his hotel room found him to be in possession of $3,456.00.

(c) That on November 21, 1994, the People of the State of Illinois filed a complaint for forfeiture seeking to have the property rights of KENNETH H. SCHRAGER terminated and the money turned over to the Director of the Illinois State Police for disbursement pursuant to statute. (See People of the State of Illinois, Plaintiff, vs. $3,456.00 U.S. Currency, Defendant, Claimant: Kenneth Schrager, Peoria County Case No. 94-MR-262.)

(d) That on January 24, 1995, the Defendant, KENNETH H. SCHRAGER, filed a pleading entitled "Claimant's Answer to Complaint for Forfeiture" and as part of that answer and in compliance with the Drug Asset Forfeiture Procedure Act, claimed that the money was not subject to forfeiture and also claimed that the Defendant, KENNETH H. SCHRAGER, was the lawful owner of the $3,456.00 in United States currency that was the subject res of that action.

(e) That on April 11, 1995, a hearing was heard upon Counts 1, 2 and 3 of the complaint for forfeiture. After both sides were given an opportunity to present evidence in said case, the Court found for the State and issued judgment in favor of the State and against the claimant, KENNETH H. SCHRAGER, in the amount of $3,456.00. (See Order of April 11, 1995, attached hereto as Exhibit 1.)

4. That on August 23, 1994, the People of the State of Illinois filed a 2-count Indictment against the Defendant,

KENNETH H. SCHRAGER, in the present case 94-CF-719. This 2-count Bill of Indictment was the result of the August 8, 1994, traffic stop and was based on the exact same facts as alleged in the previously-mentioned complaint for forfeiture in Case No. 94-MR-262.

5. That the current pending Indictment in Case No. 94-CF-719 represents double jeopardy in that the Defendant, KENNETH H. SCHRAGER, has already been punished for his alleged behavior as a result of the judgment taken by the State in Case No. 94-MR-262, and that said prosecution is barred by the double jeopardy clauses of the United States Constitution and the State of Illinois Constitution as well as the criminal statutes of the State of Illinois.

6. That the People of the State of Illinois have chosen to pursue punishment against the Defendant, KENNETH H. SCHRAGER, in forfeiture case number 94-MR-262, and, thus, the current prosecution is barred.

7. That the Appellate Court cases of People of the State of Illinois v. George Towns and People of the State of Illinois v. Roderick Turner have recently addressed this issue and make it clear that the action in the above-mentioned case constitutes double jeopardy. (See Exhibit 2 attached hereto and made a part hereof.)

WHEREFORE, the Defendant, KENNETH H. SCHRAGER, hereby prays that the Bill of Indictment currently pending against the Defendant, KENNETH H. SCHRAGER, be dismissed for the above-mentioned reasons.

KENNETH H. SCHRAGER, Defendant,
by PARKER & HALLIDAY, his attorneys,
By /s/ Ronald E. Halliday
RONALD E. HALLIDAY

..... PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on Aug. 3, 1995.

/s/ Denice M. Piercy

PARKER & HALLIDAY
Attorneys for Defendant
414 Hamilton Boulevard, Suite 300
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Telephone (309) 673-0069

The People of the State of Illinois, Appellant,

v.

John Kimery, Appellee.

Nos. 78910, 78944

Supreme Court of Illinois.

Jan. 30, 1997.

Defendant was charged with violation of Controlled Substances Act. Following forfeiture of automobile in separate forfeiture proceeding, defendant moved to dismiss criminal charges on double jeopardy grounds. The Circuit Court, Kane County, denied motion. On appeal, the Appellate Court vacated, and state appealed. The Supreme Court, 169 Ill.2d 260, 214 Ill. Dec. 475, 661 N.E.2d 329, affirmed, and state's petition for certiorari was granted. The United States Supreme Court vacated and remanded for further consideration. The Supreme Court, Miller, J., held that forfeiture statute did not violate double jeopardy clause of United States Constitution.

Reversed and remanded.

Heiple, C.J., filed dissenting opinion, in which Nickels, J., joined.

Nickels, J., filed dissenting opinion, in which Heiple, C.J., joined.

1. Double Jeopardy ⇨ 1

Double jeopardy clause of Fifth Amendment, made applicable to states by Fourteenth Amendment, protects against three perils: second prosecution after acquittal, second prosecution after conviction, and multiple punishments for same offense.

U.S.C.A. Const.Amends. 5, 14.

2. Double Jeopardy ⇨ 25

Civil in rem forfeiture action is not "punishment" for purposes of double jeopardy clause, and therefore, may be pursued independently of criminal action based on same underlying misconduct. U.S.C.A. Const. Amends. 5,14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Double Jeopardy ⇨ 25

In double jeopardy analysis, whether forfeiture provided by Controlled Substances Act and Drug Asset Forfeiture Procedure Act was civil or criminal in nature was primarily question of statutory construction. U.S.C.A. Const. Amends. 5,14; Ill.Rev.Stat. 1991, ch. 56.5, ¶¶ 1505(a)(3), 1671-1684.

4. Double Jeopardy ⇨ 25

Forfeiture under Drug Asset Forfeiture Procedure Act was not "punishment" for double jeopardy purposes and therefore did not preclude subsequent prosecution for related drug offense; General Assembly's intent to create remedial civil sanction was indicated by in rem nature of action and use of preponderance of evidence standard of proof, and proceedings under the Act were not so punitive in fact as to overcome civil attributes of the proceeding. U.S.C.A. Const. Amends. 5,14; Ill.Rev.Stat. 1991, ch. 56.5, ¶¶ 1671-1684.

5. Double Jeopardy ⇨ 23

Legislature may impose both civil and criminal sanctions with respect to same misconduct. U.S.C.A. Const. Amends. 5,14.

6. Criminal Law ⇨ 1030(2)

Although defendant invoked both state and federal double jeopardy clauses in circuit court proceedings, issue of whether State Constitution granted greater protection was waived, where defendant did not make that argument. U.S.C.A. Const. Amends.

5,14; S.H.A. Const. Art. 1, § 10.

James E. Ryan, Attorney General, Springfield, and David R. Akemann, State's Attorney, St. Charles (Norbert J. Goetten, William L. Browers and Lisa Anne Hoffman, the Office of the State's Attorneys Appellate Prosecutor, Elgin, of counsel), for the People.

Fred M. Morelli, Jr. of Morelli, Cook & Petersen, Aurora (Vincent Argento, of counsel), for appellee.

Amicus curiae Jack O'Malley, State's Attorney, Chicago (Renee Goldfarb, Thomas A. Konczal and Janet Powers Doyle, Assistant State's Attorneys, of counsel).

Justice MILLER delivered the opinion of the court:

One of the actions consolidated here, that involving defendant John Kimery, is before us on remand from the United States Supreme Court for further consideration in light of the Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

The facts pertinent to this appeal are set forth in our previous opinion in this case, *In re P.S.*, 169 Ill.2d 260, 214 Ill. Dec. 475, 661 N.E.2d 329 (1996), and require only brief restatement here. In cause No. 78910, Kimery was arrested on October 6, 1991, following an incident in which he was observed making a purchase of illicit drugs. On that occasion an Aurora police officer who was conducting surveillance saw Kimery stop his car and speak to two men, who then entered a nearby building. One of the men returned to Kimery's car several minutes later and got into the vehicle. The officer conducting the surveillance then saw the man hand Kimery a small white bag and receive money from Kimery in return. Police arrested the occupants of the vehicle and recovered a plastic bag from Kimery; the contents of the bag were later tested and were found to contain cocaine. Kimery was

charged in the circuit court of Kane County with one count of unlawful possession of a controlled substance in violation of section 402(c) of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1991, ch. 56½, par. 1402(c)), a Class 4 felony.

While the criminal charge was pending, the State filed an *in rem* forfeiture action against Kimery's vehicle, a 1982 Ford Mustang, pursuant to section 505(a)(3) of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1991, ch. 56½, par. 1505(a)(3)). The forfeiture complaint alleged the occurrence of the illegal drug sale described above. The complaint further alleged that Kimery was the registered owner of the vehicle and that the vehicle was subject to forfeiture because it had been used to facilitate the sale, receipt, possession, and concealment of a controlled substance.

Kimery entered an appearance in the forfeiture action as owner-claimant of the vehicle and requested the return of the automobile. Kimery acknowledged that he was present in the vehicle just before its seizure by authorities and admitted that a plastic bag was obtained from him, but he denied any knowledge of the contents of the bag and denied that the vehicle had been used to facilitate the alleged drug transaction. After a bench trial on May 26, 1992, the judge ordered Kimery's automobile forfeited to the State. The appellate court later affirmed the forfeiture order. *People v. One 1982 Maroon Ford Mustang*, 258 Ill.App.3d 127, 196 Ill.Dec. 440, 630 N.E.2d 137 (1994).

On August 13, 1992, after entry of the forfeiture judgment, Kimery moved to dismiss the pending criminal charge on grounds of double jeopardy. Kimery argued that forfeiture of the automobile constituted punishment for purposes of double jeopardy under the United States and Illinois Constitutions and that any further prosecution for the conduct that resulted in the forfeiture was therefore barred. The trial court took the motion under advisement, awaiting this court's opinion in *People v. 1988 Mercury Cougar*, 154 Ill.2d 27, 180 Ill.Dec. 323, 607 N.E.2d 217 (1992). Following our decision in that case, which found no double

jeopardy bar under either the federal constitution or the state constitution to successive forfeiture actions and criminal prosecutions, Kimery pleaded guilty to the charge on April 12, 1993. Before Kimery could be sentenced, however, he moved to withdraw his guilty plea and requested dismissal of the charge, renewing his contention that successive forfeiture actions and criminal prosecutions for the same conduct are barred by double jeopardy. In support of the motion Kimery cited the United States Supreme Court's then-recent decision in *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), which held that a forfeiture may constitute punishment under the excessive fines clause of the eighth amendment. Following a hearing, the trial judge denied Kimery's motion and sentenced him to one year's imprisonment. The judge stayed the sentence, however, pending the resolution of Kimery's interlocutory appeal of the double jeopardy question (see 145 Ill.2d R. 604(f)).

In an unpublished order the appellate court vacated the circuit court judgment, concluding that Kimery could not be prosecuted on the drug charge following the forfeiture of his automobile. The appellate court believed that forfeiture of the vehicle must be considered punishment and that a later criminal prosecution for the same conduct was therefore precluded by double jeopardy.

On the State's appeal, we affirmed the appellate court's disposition of Kimery's case. *In re P.S.*, 169 Ill.2d 260, 214 Ill. Dec. 475, 661 N.E.2d 329 (1996). After reviewing the Supreme Court's decisions in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), we concluded that the prior forfeiture proceeding constituted punishment for purposes of the double jeopardy clause of the fifth amendment and that a subsequent prosecution of Kimery for the same underlying conduct was therefore barred. Our decision in *1988 Mercury Cougar* preceded

the Supreme Court's rulings in *Kurth Ranch* and *Austin*, and we believed that the later decisions necessitated a result different from that reached in our earlier case. With regard to Kimery, we therefore held that the subsequent criminal prosecution was barred by double jeopardy. We reached a different result in the two other cases consolidated in *P.S.*; we found that the criminal charges in those prosecutions were for offenses distinct from the forfeiture actions and thus did not violate double jeopardy.

The State filed a petition for a writ of *certiorari* in Kimery's case. The Supreme Court granted the petition, vacated the judgment, and remanded the cause to us for further consideration in light of the Court's ruling in *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), which had been decided while the petition for *certiorari* was pending. *Illinois v. Kimery*, ___ U.S. ___, 116 S.Ct. 2577, 135 L.Ed.2d 1092 (1996). As we explain below, we now conclude that the forfeiture action at issue here does not constitute punishment for purposes of double jeopardy and therefore does not preclude, on double jeopardy grounds, Kimery's subsequent prosecution for the related drug offense.

[1] The double jeopardy clause of the fifth amendment, made applicable to the states by the fourteenth amendment (*Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)), protects against three perils: a second prosecution after acquittal, second prosecution after conviction, and multiple punishments for the same offense (*North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664-65 (1969)). At issue in this case is the third safeguard, that involving multiple punishments for the same offense. *P.S.*, 169 Ill.2d at 272, 214 Ill.Dec. 475, 661 N.E.2d 329.

[2] In *Ursery*, the Supreme Court reaffirmed the view that a civil *in rem* forfeiture action is not punishment for purposes of the double jeopardy clause and therefore may be pursued independently of criminal action based on the same underlying

misconduct. The Court noted that it had consistently held that the double jeopardy clause does not apply to such forfeitures because they do not impose punishment. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (*per curiam*); *Various Items of Personal Property v. United States*, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931). The Court did not believe that a different result was compelled by its decisions in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), cases on which this and other courts had relied in finding a double jeopardy problem in successive forfeiture actions and criminal prosecutions. The *Ursery* Court noted that *Halper* and *Kurth Ranch* addressed double jeopardy questions involving civil penalties assessed against an individual (*Halper*) and a punitive state tax imposed on illicit drugs (*Kurth Ranch*); *Austin* considered the application of the eighth amendment's excessive fine clause to civil forfeitures. The *Ursery* court explained that nothing in those three decisions "purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." *Ursery*, 518 U.S. at ___-___, 116 S.Ct. at 2147, 135 L.Ed.2d at 567-68.

In determining whether the particular forfeiture actions involved in *Ursery* constituted punishment, the Court employed a two-part inquiry derived from *89 Firearms*, which rejected a similar double jeopardy argument. First, the Court in *Ursery* asked whether Congress intended for the federal forfeitures at issue in those cases to be considered criminal or civil in nature. Next, the Court asked whether the forfeiture actions are so punitive in fact that they must be considered criminal, regardless of congressional intent. *Ursery*, 518 U.S. at ___, 116 S.Ct. at 2147, 135 L.Ed.2d at 568. After analyzing the statutory provisions at issue in those consolidated cases, the Court concluded that the forfeitures were

civil in nature.

[3] We must decide here whether the forfeiture provided by Illinois statute is civil or criminal in nature. This is primarily a question of statutory construction. *Emerald Cut Stones*, 409 U.S. at 237, 93 S.Ct. at 493, 34 L.Ed.2d at 443. Applying to the Illinois provisions the same two-part inquiry used in *Ursery* and *89 Firearms*, we conclude that the forfeiture at issue in Kimery' case constitutes a remedial civil sanction and does not bar a subsequent criminal prosecution.

[4] We must first determine whether the legislature intended the forfeiture that preceded the instant prosecution to be civil or criminal in character. The property at issue in Kimery's case was subject to forfeiture under section 505(a)(3) of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1991, ch. 56½, par. 1505(a)(3)). Forfeiture proceedings involving property seized pursuant to that statute are governed by the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (Ill.Rev.Stat. 1991, ch. 56½, pars. 1671 through 1684). See Ill.Rev.Stat. 1991, ch. 56½, par. 1505(c); Ill.Rev.Stat. 1991, ch. 56½, par. 1673. An examination of the provisions of the Forfeiture Act reveals that the General Assembly, in enacting the statute, intended to create a remedial civil sanction. Many of the civil features identified in the federal forfeiture statutes at issue in *Ursery* and *89 Firearms* can also be found in the Illinois act. Turning to the first part of our inquiry, we believe that it is clear that the legislature intended actions brought pursuant to the Forfeiture Act to be remedial civil sanctions. As an initial matter, we note that the legislature has expressly stated that the proceedings under the Forfeiture Act are civil (Ill.Rev.Stat. 1991, ch. 56½, par. 1672) and are designed to serve a remedial purpose (Ill. Rev.Stat. 1991, ch. 56½, par. 1683).

Various procedural mechanisms provided by the Forfeiture Act further demonstrate the civil nature of those proceedings. The action is *in rem* and not *in personam*. Ill.Rev.Stat. 1991, ch. 56½, pars. 1674, 1679. Furthermore, section 6 of the Forfeiture Act

provides a summary, nonjudicial proceeding for certain categories of property if no claimant appears. Ill.Rev.Stat. 1991, ch. 56½, par. 1676. The evidentiary burdens assigned by the Forfeiture Act also indicate that judicial proceedings under the statute are civil rather than criminal in character. For example, once the State establishes the existence of probable cause for forfeiture of the property, "the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture." Ill.Rev.Stat. 1991, ch. 56½, par. 1679(G). In addition, a claimant urging that the property is exempt from forfeiture has the burden of establishing that defense by a preponderance of the evidence. Ill.Rev.Stat. 1991, ch. 56½, par. 1678. These provisions demonstrate that the legislature intended to create a civil remedial sanction in the Forfeiture Act. See *Ursery*, 518 U.S. at ___-___, 116 S.Ct. at 2147, 135 L.Ed.2d at 568-69; *89 Firearms*, 465 U.S. at 363-64, 104 S.Ct. at 1105-06, 79 L.Ed.2d a 368-70.

Turning now to the second part of the test applied by the Supreme Court in *Ursery* and *89 Firearms*, we consider whether proceedings brought under the Forfeiture Act "are so punitive in form and effect as to render them criminal" notwithstanding the legislature's intent to make them civil. We do not believe that the sanction is so punitive that it overcomes the civil attributes we have listed above. Proceedings under the Forfeiture Act serve important nonpunitive goals. As the Supreme Court noted in *Ursery*, requiring the forfeiture of property used to facilitate a drug violation encourages owners "to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes." *Ursery*, 518 U.S. at ___, 116 S.Ct. at 2148, 135 L.Ed.2d at 569. Moreover, as *Ursery* observes, *in rem* civil forfeiture has not traditionally been viewed as punishment, as that term is used in the double jeopardy context. A further indication that the proceeding is not criminal is found in the absence of a requirement of proof of *scienter* to sustain a forfeiture order; property may be subject to forfeiture even if no one appears to claim it (Ill.Rev.Stat. 1991, ch. 56½, par. 1676). *Ursery*, 518

U.S. at ___, 116 S.Ct. at 2149, 135 L.Ed.2d at 570.

[5] The Supreme Court's decision in *Ursery* also suggests that several potentially punitive aspects of the Forfeiture Act, as noted in our prior opinion in this case (*P.S.*, 169 Ill.2d at 283, 214 Ill.Dec. 475, 661 N.E.2d 329), are not sufficient to overcome the essentially civil nature of the sanction. Thus, the statutory provision of an "innocent owner" defense to forfeiture actions (Ill.Rev.Stat. 1991, ch. 56½, par. 1678) is not fatal to the conclusion that forfeiture is a remedial civil sanction. The avowedly deterrent aim of the statutory scheme (Ill.Rev.Stat. 1991, ch. 56½, par. 1672) is also consistent with its civil nature. Finally, that the Forfeiture Act does not come into play until a criminal offense occurs does not defeat its civil purpose, for the legislature may impose both civil and criminal sanctions with respect to the same misconduct. *Ursery*, 518 U.S. at ___-___, 116 S.Ct. at 2149, 135 L.Ed.2d at 570-71; see also *89 Firearms*, 465 U.S. at 365-66, 104 S.Ct. at 1106-07, 79 L.Ed.2d at 370-71.

For the reasons stated, we believe that the legislature intended the forfeiture involved in Kimery's case to be merely a civil sanction, and we therefore hold that the subsequent criminal prosecution for the same underlying conduct does not implicate double jeopardy concerns. As we recognized in our earlier opinion in this case (*P.S.*, 169 Ill.2d at 282, 214 Ill.Dec. 475, 661 N.E.2d 329), the Forfeiture Act is patterned after the federal forfeiture provisions found in 21 U.S.C. § 881 (Ill.Rev.Stat. 1991, ch. 56½, par. 1672), and the General Assembly has stated that provisions of the Illinois statute should be interpreted in the same manner as are similar provisions of the federal statute. Ill.Rev.Stat. 1991, ch. 56½, par. 1672. One of the forfeiture statutes at issue in *Ursery* was the federal counterpart to the Illinois act, so it is appropriate that we reach the same result here, in light of the legislature's intent that the Forfeiture Act receive the same construction. We thus conclude that the prior forfeiture of Kimery's automobile, used in the drug transaction that forms the basis for the criminal charge, does not preclude on double jeopardy grounds a

subsequent prosecution of Kimery for that offense.

[6] As a final matter, we turn briefly to the question whether the same result must obtain under the double jeopardy clause found in article I, section 10, of the Illinois Constitution (Ill. Const. 1970, art. I, § 10). As our earlier opinion in this case noted, although Kimery and the other parties in *P.S.* invoked the double jeopardy provisions of both the United States Constitution and the Illinois Constitution in the circuit court proceedings, they did not argue that the provision of the state constitution granted greater protection or required a different result. *P.S.*, 169 Ill.2d at 271, 214 Ill.Dec. 475, 661 N.E.2d 329. Accordingly, the issue has been waived.

Moreover, we have previously interpreted our own state constitution's double jeopardy clause in a manner that is consistent with the United States Supreme Court's interpretation of the double jeopardy clause of the fifth amendment. See *People v. Levin*, 157 Ill.2d 138, 160, 191 Ill.Dec. 72, 623 N.E.2d 317 (1993). Notably, in *People v. 1988 Mercury Cougar*, 154 Ill.2d 27, 39, 180 Ill.Dec. 323, 607 N.E.2d 217 (1992), this court found no double jeopardy bar under either the United States Constitution or the Illinois Constitution to a forfeiture proceeding instituted after the defendant's conviction for conduct giving rise to the forfeiture. Nothing has occurred in the few years since that decision that would alter our analysis of the state constitutional guarantee, and thus we do not believe that the double jeopardy provision of the Illinois Constitution would warrant a different result in this case.

Brief comment should be made on the analysis proposed in one of the dissenting opinions. That opinion notes that, by the time of the 1970 state constitutional convention, most of the provisions of the Bill of Rights of the United States Constitution had been made applicable to the states. From that observation the dissenting opinion infers that the drafters of the Illinois Constitution must have intended the provisions of the state Bill of Rights to supplement the United States Constitution and to stand

"as an additional protection" against governmental over-reaching. 175 Ill.2d at 92, ___ Ill.Dec. at ___, 676 N.E.2d at 661 (Heiple, C.J., dissenting). The dissent apparently believes that the mere inclusion of a particular guarantee in the state Bill of Rights, without more, demonstrates that the provision means something different from the corresponding provision of the Bill of Rights of the United States Constitution. This approach leads to the conclusion that similar provisions of the federal and state constitutions mean different things, even though they are expressed in the same terms. Under this view, the Illinois drafters did not adopt well-established meanings when they used familiar words and phrases but instead always meant something different. Notably, the dissenting opinion offers no citation to the proceedings of the 1970 constitutional convention in support of this novel theory.

In any event, this case is not an appropriate vehicle for a reassessment of the lockstep doctrine, for consideration of that question is unnecessary to our resolution of the present appeal. In *People v. 1988 Mercury Cougar*, 154 Ill.2d 27, 180 Ill.Dec. 323, 607 N.E.2d 217 (1992), this court rejected double jeopardy challenges, under both the federal and state constitutions, to the same legislation at issue here. More recently, in *People v. Levin*, 157 Ill.2d 138, 191 Ill.Dec. 72, 623 N.E.2d 317 (1993), this court held that the double jeopardy clause of our state constitution is to be construed in the same manner as the double jeopardy clause of the federal constitution. As we have already noted, the defendant did not previously argue in the circuit court or before this court that the double jeopardy provision of the state constitution should be interpreted more expansively than its federal counterpart.

Given the precedents of *1988 Mercury Cougar* and *Levin*, this case is a curious forum in which to attempt to rekindle the debate over the interpretation of similar state and federal constitutional provisions. At the time of our original consideration of this appeal, we would have adhered to our earlier ruling in *1988 Mercury Cougar* if we had not then believed that later decisions by the United States Supreme Court compelled a different result. With

the meaning of those decisions clarified, we may now reinstate the holding of *1988 Mercury Cougar*.

For the reasons state, the judgment of the appellate court is reversed, and the cause is remanded to the circuit court of Kane County for further proceedings consistent with this opinion.

Reversed and remanded.

Justice HARRISON took no part in the consideration or decision of this case.

Chief Justice HEIPLE, dissenting:

I agree with the majority's conclusion that the fifth amendment of the United States Constitution, as interpreted by the United States Supreme Court, does not prohibit the prosecution of defendant Kimery for unlawful possession of a controlled substance following the forfeiture of his automobile to the State. Because I believe, however, that this determination does not end the inquiry we must conduct as Illinois' highest court, I respectfully dissent.

Article I, section 10, of the Illinois Constitution provides that "[n]o person shall *** be twice put in jeopardy for the same offense." Ill. Const. 1970, art. I, § 10. The majority holds that this provision should be interpreted "in a manner that is consistent with the United States Supreme Court's interpretation of the double jeopardy clause of the fifth amendment." 175 Ill.2d at 89, 221 Ill.Dec. at 858, 676 N.E.2d at 661. I do not believe there is any persuasive justification for this holding. No one would suggest that the United States Supreme Court is bound to interpret provisions of the federal Constitution in a manner that is consistent with this court's interpretation of similar provisions of the Illinois Constitution. As I have stated previously, I believe the converse of such a suggestion to be equally insupportable. See *People v. Mitchell*, 165 Ill.2d 211, 233-35, 209 Ill.Dec. 41, 650 N.E.2d 1014

(1995) (Heiple, J., dissenting).

The Illinois Bill of Rights, contained in article I of the Illinois Constitution, was enacted by citizens of this state to protect themselves against unwarranted deprivation of their lives, liberty, and property by the state's government. The most recent version of the state's constitution was ratified by the people in 1970. At that time, nearly all of the provisions of the United States Constitution's Bill of Rights had been construed by the United States Supreme Court to constrain state governments as well as the federal government. The Illinois Bill of Rights must therefore have been intended to serve as an additional protection against abuses of power by state government, supplemental to the safeguards provided by the United States Constitution. In light of this fact, I consider it a dereliction of our duties as Illinois judges to delegate the function of interpreting our state constitution to the United States Supreme Court in the manner dictated by the majority. Rather, I believe that our oaths of office require "that the seven justices of this court *** bring to bear on every important constitutional issue their independent resources of wisdom, judgment, and experience." *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 226, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988) (Clark, J., concurring).

Applying this interpretive approach, I would hold that prosecuting defendant for unlawful possession of a controlled substance following the forfeiture of the automobile which was allegedly used to facilitate that offense violates article I, section 10, of the Illinois Constitution. Initially, I note that I disagree with the majority that defendant has waived this issue. Defendant contended, both in the circuit court and on appeal, that his prosecution violated the state constitution. Moreover, he was not afforded an opportunity to rebrief this argument upon remand of this case from the United States Supreme Court. I believe we therefore have a responsibility to address the issue.

The plain wording of section 10 prohibits putting a person

in jeopardy twice for the same offense. The determinative question is thus whether the forfeiture of defendant's automobile to the state based on the vehicle's alleged use in facilitating a crime constitutes putting defendant in jeopardy for the commission of that crime. If it does, the state is barred from conducting a separate proceeding that also puts defendant in jeopardy for that crime.

I believe that the forfeiture which the state effected here clearly put defendant in jeopardy for an offense that was the same as that for which he was later prosecuted. The Illinois Constitution prohibit the undue deprivation not only of a person's life and liberty, but also of his property. Ill. Const. 1970, art. I, § 2. A proceeding brought to deprive a person of property based on his commission of a crime thus puts him "in jeopardy" for that crime just as surely as does a proceeding to deprive him of liberty. Likewise, it is clear that the two instances of jeopardy here were directed at the "same offense," because defendant was charged with committing only one illegal act, namely, unlawful possession of a controlled substance. But for the commission of this offense, there was no basis for the forfeiture, since " '[t]here is nothing even remotely criminal in possessing an automobile.' " *Austin v. United States*, 509 U.S. 602, 621, 113 S.Ct. 2801, 2811, 125 L.Ed.2d 488, 505 (1993), quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170, 174 (1965).

I am not persuaded by the majority's arguments that a forfeiture such as this does not place a defendant in jeopardy for commission of an offense. First, I consider it irrelevant that the legislature may have intended the forfeiture to be civil rather than criminal in character. See 175 Ill.2d at 86, 221 Ill.Dec. at 856-57, 676 N.E.2d at 659-60. If an action by the government violates a constitutional prohibition, no amount of evidence manifesting the legislature's purportedly benign intent in authorizing that action can render the action constitutional. I consider it similarly irrelevant, in assessing the *constitutionality* of a statute under our state constitution, that the legislature has expressed an intention that *statutory* construction of the provision comport with the

interpretation of similar statutes by the federal courts. See 175 Ill.2d at 88-89, 221 Ill.Dec. at 857-58, 676 N.E.2d at 660-61.

I am also not persuaded by the majority's assertion that "important nonpunitive goals" of the instant forfeiture immunize it from constitutional challenge under double jeopardy principles. See 175 Ill. 2d at 87, 221 Ill.Dec. at 857, 676 N.E.2d at 660. In our prior opinion in this case, we held that a forfeiture of property violates double jeopardy if it serves even in part to punish the defendant. *In re P.S.*, 169 Ill.2d 260, 282, 214 Ill.Dec. 475, 661 N.E.2d 329 (1996). We then proceeded to hold that various punitive aspects of the forfeiture, including its avowedly deterrent aim, its "innocent owner" defense, and its dependence on an underlying criminal violation, rendered it subject to double jeopardy constraints. *P.S.*, 169 Ill.2d at 283, 214 Ill.Dec. 475, 661 N.E.2d 329. I believed this analysis to be persuasive at the time our previous opinion was issued, and I remain persuaded despite the United States Supreme Court's contrary interpretation of the United States Constitution.

In *People v. 1988 Mercury Cougar*, 154 Ill.2d 27, 180 Ill.Dec. 323, 607 N.E.2d 217 (1992), this court held that the forfeiture of a vehicle in a proceeding separate from a prosecution for an underlying drug offense does not constitute double jeopardy. That opinion, however, interpreted federal precedent only, and did not specifically address the applicability of article I, section 10, of the Illinois Constitution. In *People v. Levin*, 157 Ill.2d 138, 191 Ill.Dec. 72, 623 N.E.2d 317 (1993), we refused to interpret article I, section 10, more broadly than the United States Constitution's double jeopardy provision. *Levin*, however, dealt only with the application of double jeopardy principles to noncapital sentencing procedures. *Levin*, 157 Ill.2d at 160, 191 Ill.Dec. 72, 623 N.E.2d 317. I believe that striking the proper balance between law enforcement and individual liberty in the ever-escalating "war on drugs" now requires that this court exercise its independent judgment in declaring unconstitutional forfeitures conducted in the manner evidenced here. See *People v. Mitchell*, 165 Ill.2d 211,

233-35, 209 Ill.Dec. 41, 650 N.E.2d 1014 (1995) (Heiple, J., dissenting).

Because I believe that defendant has been twice put in jeopardy for the same offense in violation of the Illinois Constitution, I would affirm the judgment of the appellate court.

Justice NICKELS joins in this dissent.

Justice NICKELS, also dissenting:

In light of the United States Supreme Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), I agree with the majority's conclusion that the double jeopardy clause of the United States Constitution does not forbid Kimery's criminal prosecution. Nonetheless, I believe Kimery is protected from prosecution under our state constitution's double jeopardy clause (Ill. Const. 1970, art. I, § 10).

We are bound to follow the United States Supreme Court's decisions on matters of federal constitutional law. However, the obligation to apply those decisions when interpreting parallel provisions of our state constitution is one that this court has imposed upon itself under the so-called "lockstep doctrine." Under this doctrine, courts apply decisions of the United States Supreme Court based on federal constitutional provisions to the construction of comparable provisions of the state constitution unless the language of the state constitution or debates and committee reports of the constitutional convention show that the framers intended a different construction. *People v. DiGuida*, 152 Ill.2d 104, 118, 178 Ill.Dec. 80, 604 N.E.2d 336 (1992); see also *People v. Mitchell*, 165 Ill.2d 211, 217, 209 Ill.Dec. 41, 650 N.E.2d 1014 (1995). Thus, the determination whether to follow United States Supreme Court precedent depends on a comparison of the state and federal constitutions; the quality of the *reasoning* underlying the Court's decisions plays no role in the calculus.

I believe the time has come to reconsider the lockstep approach in this respect. Where a provision of the state constitution was intended to have the same meaning as a federal constitutional provision, decisions of the United States Supreme Court are entitled to consideration. However, examination of the reasoning behind those decisions should not categorically be foreclosed. I would follow the approach suggested by Justice Clark in his concurrence in *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988):

> "[A]s to our State constitutional provisions, Federal precedents are not *stare decisis*. They are persuasive and not determinative. Where their reasoning persuades us, we should follow them. Where they do not, we should not." *Joyce*, 126 Ill.2d a 225, 127 Ill.Dec. 791, 533 N.E.2d 873 (Clark, J., concurring).

I dissent not because I believe the state and federal double jeopardy provisions necessarily have different meanings. Rather, I dissent because I am convinced that the Court's decision in *Ursery* fails to give the double jeopardy clause its proper effect, and in interpreting our state constitution, this court is not obliged to make the same error. *Ursery* is premised upon the fanciful notion that in an *in rem* civil forfeiture proceeding, it is the seized property that is punished rather than the owner of the property. See *Ursery*, 518 U.S. at ___, 116 S.Ct. at 2153, 135 L.Ed.2d at 576 (Stevens, J., concurring in part & dissenting in part). Justice Stevens' partial dissent in *Ursery* persuasively demonstrates that the majority opinion in that case represents an abrupt and unwarranted departure from the Court's prior double jeopardy jurisprudence. See *Ursery*, 518 U.S. at ___-___, 116 S.Ct. at 2152-63, 135 L.Ed.2d at 574-89. (Stevens, J., concurring in part & dissenting in part). I am convinced that our original opinion in this case, *In re P.S.*, 169 Ill.2d 260, 214 Ill.Dec. 475, 661 N.E.2d 329 (1996), properly applied the applicable double jeopardy principles and reached the correct result. For purposes of our state constitution, I would adhere to the analysis in our original opinion.

For the foregoing reasons, I respectfully dissent.

Chief Justice HEIPLE joins in this dissent.